Sibu Slipway Sdn Bhd v Lambang Sinar Mas Sdn Bhd (Yii Chee Ming & Anor, applicants) and other cases

HIGH COURT (SHAH ALAM) — COMPANIES (WINDING-UP) NOS 28NCC-397–08 OF 2015, 28NCC-399–08 OF 2015 AND 28NCC-400–08 OF 2015
MOHD YAZID J
8 JUNE 2016

Companies and Corporations — Winding up — Stay of order — Petitioners obtained winding up orders — Applicants sought to stay winding up order — Whether applicants contributories — Whether winding up orders obtained by fraud and/or intentional concealment of material facts — Companies Act 1965 ss 2 & 243

Yu Chee Hoe and Tony Yuong Wee ('the petitioners') were the shareholders of Sibu Slipway Sdn Bhd ('Sibu Slipway') whereas Yii Chee Ming and Datuk Yii Chi Hau ('the applicants'); and the petitioners were brothers. Lambang Sinar Mas Sdn Bhd and Ensengei Palm Oil Mill Sdn Bhd were the fully owned subsidiaries of Sibu Slipway. All the three companies were incorporated in Kuching, Sarawak. On 22 July 2015, all the companies were transferred and registered in Shah Alam, whereby at the time of the transfer, nine cases were jointly tried and pending in the Kuching High Court. Nevertheless, on 17 August 2015, the petitioners had presented the winding up petition in Shah Alam High Court and consequently, on 18 September 2015 the court granted the winding up order of all the three companies. The applicants in the present action sought for the stay of the winding up order made on 18 September 2015 on the ground that the said order were obtained by fraud and/or intentional concealment of material facts by the petitioners. In opposition, the petitioners submitted that the applicants were neither shareholders nor creditors to the companies; and there was no concealment of the material facts when the petitions were filed.

Held:

(1) Based on the audited report, the applicants had established that they injected substantial amount of capital to the companies. Further, paras 6 and 9 of the affidavit of Yii Chee Ming stated the factual background leading to the incorporation of the three companies which were family companies. There was also related family suit in Kuching associated to the issue of legal and beneficiary ownership of Sibu Slipway, involving the

same parties. Thus, on the facts, both the applicants were the contributories as defined under s 2 of the Companies Act 1965 ('the Act') (see paras 13–16).

(2) The petitioners deliberately transferred the registered office of the companies to Shah Alam with the intention to defeat the ongoing proceedings in Kuching High Court. Further, based on the factual matrix of the case, the petitioners were in the rush to obtain the winding up order in Shah Alam without disclosing the proceeding in Kuching High Court which had direct nexus. Based on the above reasons, the applicants had shown sufficient evidence and thus, they came within the pre-requisite of s 243 of the Act (see paras 30–32).

[Bahasa Malaysia summary

Yu Chee Hoe dan Tony Yuong Wee ('pempetisyen-pempetisyen') adalah pemegang-pemegang saham Sibu Slipway Sdn Bhd ('Sibu Slipway') sementara Yii Chee Ming dan Datuk Yii Chi Hau ('pemohon-pemohon'); dan pempetisyen-pempetisyen adalah adik-beradik lelaki. Lambang Sinar Mas Sdn Bhd dan Ensengei Palm Oil Mill Sdn Bhd adalah subsidiari yang dimiliki penuh oleh Sibu Slipway. Ketiga-tiga syarikat adalah diperbadankan di Kuching, Sarawak. Pada 22 Julai 2015, kesemua syarikat dipindahkan dan didaftar di Shah Alam, di mana pada masa pemindahan, sembilan kes dibicarakan secara bersama dan menunggu untuk didengar di Mahkamah Tinggi Kuching. Walau bagaimanapun, pada 17 Ogos 2015, pempetisyen-pempetisyen telah mengemukakan petisyen penggulungan di Mahkamah Tinggi Shah Alam dan akibatnya, pada 18 September 2015 mahkamah memberikan perintah penggulungan terhadap kesemua ketiga-tiga syarikat. Pemohon-pemohon dalam tindakan ini memohon untuk penangguhan perintah penggulungan yang dibuat pada 18 September 2015 atas alasan bahawa perintah tersebut diperolehi oleh fraud dan/atau penyembunyian sengaja fakta material pempetisyen-pempetisyen. Dalam menentang, pempetisyen-pempetisyen berhujah bahawa pemohon-pemohon bukan pemegang-pemegang saham ataupun pemiutang-pemiutang kepada syarikat-syarikat; dan tidak terdapat penyembunyian fakta material apabila petisyen difailkan.

Diputuskan:

(1) Berdasarkan laporan yang diaudit, pemohon-pemohon telah membuktikan bahawa mereka telah melaburkan jumlah substansial modal kepada syarikat-syarikat. Selanjutnya, perenggan 6 dan 9 afidavit Yii Chee Ming menyatakan latar belakang fakta yang membawa kepada pemerbadanan ketiga-tiga syarikat yang mana adalah syarikat-syarikat keluarga. Juga terdapat tindakan keluarga yang berkaitan di Kuching berhubungan kepada isu undang-undang dan pemilik benefisiari Sibu Slipway, melibatkan pihak yang sama. Oleh itu, atas fakta, kedua-dua

pemohon adalah penyumbang seperti yang didefinisikan di bawah s 2 Akta Syarikat 1965 ('Akta') (lihat perenggan 13–16).

(2) Pempetisyen-pempetisyen dengan sengaja memindahkan pejabat berdaftar syarikat-syarikat ke Shah Alam dengan niat untuk menggagalkan prosiding yang sedang berjalan di Mahkamah Tinggi Kuching. Selanjutnya, berdasarkan atas matriks fakta kes, pempetisyen-pempetisyen adalah dalam keadaan tergesa-gesa untuk mendapatkan perintah penggulungan di Shah Alam tanpa mendedahkan prosiding di Mahkamah Tinggi Kuching yang mempunyai neksus langsung. Berdasarkan atas alasan-alasan di atas, pemohon-pemohon telah menunjukkan keterangan yang memadai dan oleh itu, ia terangkum dalam pra-syarat s 243 Akta (lihat perenggan 30–32).]

Notes

For cases on stay of order, see 3(1) *Mallal's Digest* (5th Ed, 2015) paras 1970–1986.

Cases referred to

Megah Teknik Sdn Bhd v Miracle Resources Sdn Bhd [2010] 4 MLJ 651, CA (refd)

Sri Hartamas Development Sdn Bhd v MBf Finance Bhd [1991] 3 MLJ 325, SC (refd)

Vijayalakshmi Devi d/o Nadchatiram v Dr Mahadevan s/o Nadchatiram & Ors [1995] 2 MLJ 709, FC (refd)

Legislation referred to

Companies Act 1965 ss 2, 243, 243(1)

Gopal Sri Ram (Lim Choon Khim, David Yii, Hoo Yee Huan and Andy Tan with him) for the applicant.

Siva Garnish (Malik Imtiaz Sanwar and Pavendeep Singh with him) for the respondent.

Shanesh Jeevaratnam as a liquidator.

Mohd Yazid J:

[1] There are three notice of motion involving the same issues before this court:

(a) 28NCC-397–08 of 2015;

(b) 28NCC-399–08 of 2015; and

(c) 28NCC-400–08/2015.

[2] The applicants in the aforesaid motions seeking for the stay of the winding up order made on 18 September 2015. In the alternative, the winding up order made on 18 September 2015 be stayed until the final determination of the proceedings.

[3] The applicants relies on the ground, inter alia, that the winding up orders made herein were obtained by fraud and/or intentional concealment of material facts by the petitioners.

[4] On the hearing date, Datuk Seri Gopal Sri Ram informed the court that he is not proceeding with the alternative prayer.

[5] The petitioners opposed the motions on two mains grounds. Firstly that the applicants are neither shareholders nor creditors to the respondent. Secondly, there was no concealment of the material facts when the petitions were filed. The petitioners aver all legal procedures had been complied with and the winding up order was regularly obtained.

[6] The petitioners submitted that the applicants have failed to show that the conditions or the perquisites of s 243(1) of the Companies Act 1965 to grant stay has been complied with and the motions ought to be dismissed with costs.

THE APPLICABLE LAW

[7] Section 243(1) of the Companies Act provides that:

> At any time after an order for winding up has been made the Court may, on the application of the liquidator or of any creditor or contributory and on proof to the satisfaction of the Court that all proceedings in relation to the winding-up ought to be stayed, make an order staying the proceedings either altogether or for a limited time on such terms and conditions as the Court thinks fit.

[8] Supreme Court in *Sri Hartamas Development Sdn Bhd v MBf Finance Bhd* [1991] 3 MLJ 325 held that under s 243(1) of the Act after an order for the winding up has been made by the court, the application for stay for all proceedings relating to the winding up may be made only by the liquidator or any creditor or contributory. Thus any other person is not qualified to apply for stay under that section. Upon such application under s 243(1) of the Act the court may order stay of the proceedings on such terms and conditions as the court may think fit.

[9] Court of Appeal in *Megah Teknik Sdn Bhd v Miracle Resources Sdn Bhd* [2010] 4 MLJ 651 held that under s 243 of the Act only a liquidator or any creditor or contributory is entitle to apply for a stay of a winding up order (held 3 is referred).

[10] The Federal Court had in *Vijayalakshmi Devi d/o Nadchatiram v Dr Mahadevan s/o Nadchatiram & Ors* [1995] 2 MLJ 709 explained the considerations a court should take into account in considering whether to stay a winding up order under s 243(1) of the Companies Act 1965. Mohamed Dzaiddin FCJ (as he then was) stated:

> It is clear from sub-s (1) that the court has a discretion, on the application of the liquidator or official receiver; or any creditor or contributory to stay the proceedings under a winding up order. But, before granting a stay; the section requires on proof to the satisfaction of the court that it ought to grant a stay. This means that the court has to be satisfied that it is right to stay the winding-up proceeding and if there be matters as to which the court has doubts, it should not grant a stay (*Re Lowston Ltd* [1991] BCLC 570).
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> The principles which governed the court in the exercise of its jurisdiction whether to grant or refuse a stay have been established in the following cases. In the leading case of *Re Telescriptor Syndicate Ltd*, Buckley J was dealing with an application under s 89 of the English Companies Act 1862, which is similar to our s 243 which provided that the court may at any time after a winding up order, upon the application of any creditors or contributory and 'upon proof to the satisfaction of the Court that all proceedings in relation to such winding-up ought to be stayed', make an order staying the same. What then should be the material considerations to induce the court to order a stay? According to Buckley J (taken from the headnote which summarised the text of his decision) at p 174:
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> > In the exercise of its jurisdiction with reference to staying proceedings under an order for the winding-up of a company, the Court shouldso far as possible, act upon the principles which are applicable in exercising jurisdiction to rescind a receiving order or annul an adjudication in bankruptcy against an individual in which cases the Court refuses to act upon the mere assent of the creditors in matter; and considers not only whether the rescission or annulment will be conducive or detrimental to commercial morality and to the interests of the public at large.

[11] Based on the above law, it is trite the onus is on the applicants to show that the conditions or the pre-requisites set up under s 243(1) as decided in the above cases have been fulfilled.

ANALYSIS AND FINDING

Whether applicants are the contributories

[12] The first issue to decide is whether the applicants Yii Ghee Ming and Yii Chi Hau are the contributories of Sibu Slipway Sdn Bhd, Lambang Sinar Mas Sdn Bhd and Ensengei Palm Oil?

[13] I am satisfied that the facts set out in the affidavits, both of applicants are the contributories. My reasons are as follows. Firstly, based on the audited

report, it is evident the applicants' have establish that they injected substantial amount of capital to the said companies.

[14] Secondly, paras 6 and 9 of the affidavit, Yii Chee Ming stated the factual background leading to the incorporation of the three companies, which I find that family companies are operated on the basis of mutual trust and confidence between the siblings, wherein the profits of the companies are paid into a family common pool of funds. These family companies are sometimes held in the name of only one or two or more brothers on the mutual understanding that at the end of the day, each brother would be entitled to one-sixth (1/6) share of the whole family assets and businesses.

[15] Lastly, there is related family suit in Kuching, Civil Suit No KCH-22NCVC-2/5 of 2014, upon perusing the claim, it relates to the issue of legal and beneficiary ownership of Sibu Slipway Sdn Bhd, involving the same parties.

[16] Given that the issues in paras 14 and 15 are still pending determination by court, I find the applicants are the contributories as defined under s 2 of the Act.

Whether the winding up orders were obtained by fraud and/or intentional concealment of material facts

[17] The applicants and the petitioner are brothers. End of 2013 there have been disputes between the parties which culminated into a series of legal proceeding filed in the High Court Kuching, concerning the ownership of the family assets and companies.

[18] Sibu Slipway Sdn Bhd was incorporated on 7 November 1991, its shareholders were one of Yu Chee Hoe and Tony Yuong Wee. Lambang Sinar Mas Sdn Bhd, was incorporated on 25 September 2003, whereas Ensengei Palm Oil was incorporated on 5 June 2009, and are the fully owned subsidiaries or Sibu Slipway Sdn Bhd.

[19] The companies were all incorporated in Kuching, East Malaysia.

[20] On 22 July 2015, all the three companies were transferred and registered in Shah Alam.

[21] The three winding up petition were presented on 17 August 2015 and on 18 September 2015, the court granted the winding up of all three companies.

[22] At the time of the transfer, nine cases were jointly tried and pending in the Kuching High Court.

[23] On 19 March 2014 and 20 March 2014, the applicants filed the ex parte application for injunction to preserve the shares of the two companies, namely Megapron Engineering Sdn Bhd and Megakina Shipping Sdn Bhd.

[24] On 19 November 2014, the injunctions were affirmed inter parties by the High Court of Kuching. On 23 March 2015, the joint trial of these nine cases commenced before the learned judicial commissioner Azhahari Kamal bin Ramli at the High Court of Kuching. The trial continued on 24–27 March 2015, 11–28 May 2015 and 21–25 September 2015.

[25] On 25 June 2015, the Court of Appeal affirmed the injunctions given on 19 November 2014.

[26] On 11 June 2015, the applicant took out an applications to obtain an order for the preservation and was originally fixed for hearing on 13 July 2015, and reschedule subsequently to 21 September 2015, which is the same date fixed for the continued joint trial of the nine cases mentioned above.

[27] Before the transfer, at all material time, the common company secretary of the three companies was Augustine Law Sek Hian of 83, Pelita Heights, Lorong Stutong 1B, Stampin, 93350 Kuching Sarawak. Whereas on about 21 July 2015, the common company secretary of the three companies was changed to Dr Addossayam @ Xavier a/l Suseimanikam of Wisma Adiss Udarama Complex, No 1-3A, Jalan 1/64A, 50350 Kuala Lumpur.

[28] I find it is obvious that the three petitions were filed in Shah Alam High Court on 17 August 2015, less than a month after the change of the common registered address and common company secretary and before the said application for a preservation order in Civil Suit No KCH-22NCVC-16/3 of 2014 could be heard in the High Court of Kuching.

[29] While the suits being tried, the winding up petitions were presented in Shah Alam High Court and on 18 September 2015 the court granted the winding up order. As the result, the entire trial of the Kuching actions have been aborted, cannot go on because of the winding up order.

[30] On the above facts, I am in agreement with the applicants counsel submission that when Yu Chee Hoe and Tony Yu Yuong Wee presented the three petitions before the High Court Shah Alam had suppressed and concealed material facts in particular with regard to the beneficial ownership of

the shares and assets in these three companies. I find the petitioners deliberately transferred the registered office of the three companies to Shah Alam with intention to defeat the ongoing proceeding in Kuching High Court. I find this act of filing the three suits in Shah Alam a month after they changed the companies registered office in Shah Alam substantiated the finding. Furthermore the affidavit evidence show the address of the petitioner are in Kuching.

[31] Lastly the factual matrix clearly show the petitioners were in the rush to obtain the winding up order in Shah Alam without disclosing the proceeding in Kuching High Court which have direct nexus.

[32] Based on the above reasons, I am satisfied that the applicants have shown sufficient evidence and therefore they come within the pre-requisite of s 243 of the companies winding up.

Order accordingly.

Reported by Dzulqarnain Ab Fatar